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## Can the City Council Praise the Lord? Some Ruminations About Prayers at Local Government Meetings

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**CAN THE CITY COUNCIL PRAISE THE LORD? SOME  
RUMINATIONS ABOUT PRAYERS AT LOCAL GOVERNMENT  
MEETINGS**

MARC ROHR\*

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I. INTRODUCTION

The short answer is: Yes, a city council can give praise to a deity—at least through the medium of prayer offered at a council meeting to a generic “God.” But can such a prayer be addressed to, say, “our Lord, Jesus Christ”? The answer to that question is far from clear, as the disparate decisions rendered by federal appellate courts in two recent cases demonstrate.<sup>1</sup>

II. A TALE OF TWO COUNTY COMMISSIONS

In a decision rendered in 2008, the United States Court of Appeals for the Eleventh Circuit held that even sectarian prayers are constitutionally permissible at governmental meetings, as long as the governmental entity has not acted with the impermissible motive of advancing a particular religious belief or affiliating the government with a specific faith.<sup>2</sup> The result of that decision was the rejection of an Establishment Clause challenge, brought by

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1. Compare *Joyner v. Forsyth Cnty.*, 653 F.3d 341, 353, 355 (4th Cir. 2011), *cert. denied*, 132 S. Ct. 1097 (2012), with *Pelphrey v. Cobb Cnty. (Pelphrey III)*, 547 F.3d 1263, 1278 (11th Cir. 2008).

2. *Pelphrey III*, 547 F.3d at 1271–74, 1278.

citizens and taxpayers of Cobb County, Georgia, in the following circumstances:

Both the Cobb County Commission and the Cobb County Planning Commission have a long tradition of opening their meetings with a prayer offered by volunteer clergy or other members of the community. The clergy have represented a variety of faiths, including Christianity, Islam, Unitarian Universalism, and Judaism, and their diverse prayers have, at times, included expressions of their religious faiths.

....

... The majority of the speakers are Christian . . . . The taxpayers contend that, between 1998 and 2005, 96.6[%] of the clergy . . . were Christian. During the same period, adherents to the Jewish, Unitarian Universalist, Muslim, and Baha'i faiths also provided invocations.

... Over the past decade, 70[%] of prayers before the County Commission and 68[%] of prayers before the Planning Commission contained Christian references. Often the prayers ended with references to "our Heavenly Father" or "in Jesus' name we pray." Prayers also contained occasional references to the Jewish and Muslim faiths, such as references to Passover, Hebrew prayers, Allah, and Mohammed.<sup>3</sup>

More recently, the United States Court of Appeals for the Fourth Circuit held that the Forsyth County—North Carolina—Board of Commissioners was acting in violation of the Establishment Clause in the following circumstances:

On December 17, 2007, [plaintiffs] decided to attend a meeting of the Forsyth County Board of [County] Commissioners. Like all public Board meetings, the gathering began with an invocation delivered by a local religious leader. And like almost every previous invocation, that prayer closed with the phrase, "For we do make this prayer in Your Son Jesus' name, Amen."

....

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3. *Id.* at 1266–67.

. . . [T]he prayers frequently contained references to Jesus Christ; indeed, at least half of the prayers offered between January 2006 and February 2007 contained concluding phrases such as “We pray this all in the name under whom is all authority, the Lord Jesus Christ,” “[I]t’s in Jesus’ name that we pray[,] Amen,” and “We thank You, we praise You, and we give Your name glory, and we ask it all in Your Son Jesus’ name.”

. . . .

. . . [T]he prayers repeatedly continued to reference specific tenets of Christianity. These were not isolated occurrences: between May 29, 2007 and December 15, 2008, almost four-fifths of the prayers referred to “Jesus,” “Jesus Christ,” “Christ,” or “Savior.” In particular, most of the prayers closed by mentioning Jesus . . . [n]one of the prayers mentioned non-Christian deities.<sup>4</sup>

The purpose of this essay is to briefly explain and evaluate these decisions.

### III. THE DOCTRINAL BACKGROUND

#### A. Lemon

Beginning in 1971, in a case known as *Lemon v. Kurtzman*,<sup>5</sup> the Supreme Court of the United States has, most often, in cases involving Establishment Clause challenges to government actions, required the government to establish that it acted with a secular purpose, that the primary effect of the challenged action is not the advancement of religion, and that the challenged action has not resulted in “excessive entanglement” between government and religion.<sup>6</sup> If the government does not prevail with respect to each prong of this test—known forever after as the *Lemon* test—it loses.<sup>7</sup> Note, too, that it is not a required element of an Establishment Clause violation that a governmental actor be found to have promoted, or advanced, a *particular* religion—although such a finding would almost surely lead to a finding of un-

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4. *Joyner*, 653 F.3d at 342–44.

5. 403 U.S. 602 (1971).

6. *Id.* at 612–13. The test has been modified in recent years, but remains essentially the same. See *McCreary Cnty. v. ACLU of Ky.*, 545 U.S. 844, 864–65 (2005), *cert denied*, 131 S. Ct. 1474 (2011); *Agostini v. Felton*, 521 U.S. 203, 233 (1997).

7. See *Lemon*, 403 U.S. at 612–13.

constitutionality;<sup>8</sup> the promotion or advancement of religion in general will suffice.<sup>9</sup>

## B. Marsh

In a 1983 decision, *Marsh v. Chambers*,<sup>10</sup> however, the Supreme Court of the United States—without applying the *Lemon* test—rejected an Establishment Clause challenge to the offering of prayers, by a paid chaplain, at the start of each day of a state legislative session.<sup>11</sup> If the Supreme Court had applied the *Lemon* test in *Marsh*, answers to one or more of the following questions would have been dispositive: Is the offering of a prayer motivated by a religious purpose?<sup>12</sup> Is its primary effect the advancement of religion? Does the practice of bringing members of the clergy to government meetings, for the purpose of offering religious invocations, result in excessive “entanglement” of church and state? The Eighth Circuit Court of Appeals believed that the answer to each of these questions was clearly “yes”<sup>13</sup>—as did the Supreme Court Justices who dissented in *Marsh*<sup>14</sup>—but the majority felt no need to even address those questions.<sup>15</sup> Instead, Chief Justice Burger, writing for the majority, relied on historical practice, particularly the fact that the very first Congress in 1789 adopted the policy of selecting a chaplain to open each legislative session with a prayer.<sup>16</sup> “Clearly,” he concluded, “the men who wrote the First Amendment Religion Clauses did not view paid legislative chaplains and opening prayers as a violation of that Amend-

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8. See, e.g., *Larson v. Valente*, 456 U.S. 228, 244 (1982). “The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another.” *Id.*

9. *Edwards v. Aguillard*, 482 U.S. 578, 585 (1987).

10. 463 U.S. 783 (1983).

11. *Id.* at 784–85, 792–95.

12. Note that Justice O'Connor later argued, more than once, that “[p]ractices such as legislative prayers . . . serve the secular purposes of ‘solemnizing public occasions’ and ‘expressing confidence in the future.’” *Cnty. of Allegheny v. ACLU, Greater Pittsburgh Chapter*, 492 U.S. 573, 630 (1989) (O'Connor, J., concurring) (quoting *Lynch v. Donnelly*, 465 U.S. 668, 693 (1984) (O'Connor, J., concurring)). Such practices, she wrote, were examples of “ceremonial deism,” which, by virtue of their “longstanding existence” and “nonsectarian nature,” “do not convey a message of endorsement of particular religious beliefs.” *Id.* at 630–31; see also *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 35–37 (2004) (O'Connor, J., concurring). But note that she spoke explicitly of “nonsectarian” religious references. See *Cnty. of Allegheny*, 492 U.S. at 631 (O'Connor, J., concurring).

13. *Chambers v. Marsh*, 675 F.2d 228, 234–35 (8th Cir. 1982), *rev'd*, 463 U.S. 783 (1983).

14. See *Marsh*, 463 U.S. at 797–801 (Brennan, J., dissenting).

15. See *id.* at 784–86, 792–94 (majority opinion).

16. *Id.* at 786–88.

ment.”<sup>17</sup> Prayers in public schools, of course, had already been found to violate the Establishment Clause,<sup>18</sup> and would be again,<sup>19</sup> but there was no eighteenth century precedent for these practices, as there was for “legislative” prayer.<sup>20</sup> Thus, the practice was constitutional.<sup>21</sup> While commentators continue to criticize this decision,<sup>22</sup> there is no reason to believe that it is likely to be overruled.

### C. Endorsement

Another important component of contemporary Establishment Clause doctrine, which emerged a year after the *Marsh* decision, should also be noted: The introduction, by Justice O’Connor, of the principle that the Establishment Clause should be understood as primarily posing a bar to government “endorsement” of religion.<sup>23</sup> “Endorsement,” she wrote, “sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community.”<sup>24</sup> Thus, government action would violate the Establishment Clause if it had either the purpose or effect of conveying a message of endorsing religion.<sup>25</sup> She later clarified that this determination was to be made through the eyes of “an objective observer.”<sup>26</sup> Although this “endorsement” test—as it is now understood—found its first expression in a concurring opinion, its influence was detectable in Supreme Court majority opinions almost immediately.<sup>27</sup>

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17. *Id.* at 788.

18. *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 225–26 (1963); *Engel v. Vitale*, 370 U.S. 421, 433, 436 (1962).

19. *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 315, 317 (2000); *Lee v. Weisman*, 505 U.S. 577, 599 (1992).

20. *Marsh*, 463 U.S. at 786–88.

21. *Id.* at 795.

22. See, e.g., Christopher C. Lund, *Legislative Prayer and the Secret Costs of Religious Endorsements*, 94 MINN. L. REV. 972, 976–77 (2010) (“Religious liberty, within the sphere of legislative prayer, thus becomes a perverse sort of zero-sum game—no matter how it is done, someone’s religious liberty will inevitably be lost as a consequence. The only way to really protect religious liberty, it seems, is by not having legislative prayer at all.”); Eric J. Segall, *Mired in the Marsh: Legislative Prayers, Moments of Silence, and the Establishment Clause*, 63 U. MIAMI L. REV. 713, 725 (2009).

23. *Lynch v. Donnelly*, 465 U.S. 668, 688 (1984) (O’Connor, J., concurring).

24. *Id.*

25. See *id.*

26. *Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 348 (1987) (O’Connor, J., concurring).

27. *Wallace v. Jaffree*, 472 U.S. 38, 56 & n.42 (1985).

If this test were to be applied, might not the offering of a prayer at a city council meeting be perceived, by an objective observer, as an endorsement of religion, particularly if the prayer makes reference to the beliefs of a particular religion?

#### IV. DOES *MARSH* GOVERN?

Because of the *Marsh* decision, lower courts have agreed that prayers, benedictions, and invocations can be offered at the start of meetings of the governing bodies of cities and counties, as well as at state legislative sessions.<sup>28</sup> This is a key threshold determination, because the generally applicable *Lemon* and endorsement tests would presumably govern the question at hand if the reasoning of the decision in *Marsh*—a case involving the utterance of prayers at sessions of a state legislature, resolved on the basis of the age-old practice of our national legislature—were found to be inapplicable at the local legislative level.<sup>29</sup>

Should *Marsh* apply at the local level, or not? Again, the general assumption by lower courts is that it does.<sup>30</sup> But Judge Middlebrooks, dissenting in the Cobb County case, took the position that *Marsh*—“an outlier in Establishment Clause jurisprudence”—should *not* govern prayers at government meetings at the local level.<sup>31</sup> Prayers at meetings of the county commissions involved in this case, he argued, “hardly can be considered part of the fabric of this nation’s history.”<sup>32</sup> He pointed out, in addition, that the county commission—in contrast to a state legislature—performed executive and adjudicative, as well as legislative, functions,<sup>33</sup> contrasting a state legislative session “with a county commission acting in a quasi-adjudicative role, deciding whether to terminate an employee, suspend a liquor license, or grant a zoning variance. A citizen seeking relief has little choice but to attend.”<sup>34</sup>

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28. See the summary of the relevant case law in *Pelphrey III*, 547 F.3d 1263, 1272–74 (11th Cir. 2008). But a federal appellate court recently held that the *Marsh* legislative prayer exception did not apply to meetings of a school board which students routinely attended. *Doe v. Indian River Sch. Dist.*, 653 F.3d 256, 275 (3d Cir. 2011), *cert. denied*, 132 S. Ct. 1097 (2012).

29. *Marsh v. Chambers*, 463 U.S. 783, 784, 787–88 (1983); *see, e.g., Lemon v. Kurtzman*, 403 U.S. 602, 612–13 (1971).

30. *See, e.g., Pelphrey III*, 547 F.3d at 1275. *But see* *Coles ex rel. Coles v. Cleveland Bd. of Educ.*, 171 F.3d 369, 380–81, 383 (6th Cir. 1999) (finding *Marsh* inapplicable to school board meetings).

31. *Pelphrey III*, 547 F.3d at 1286 (Middlebrooks, J., dissenting).

32. *Id.*

33. *Id.* at 1287.

34. *Id.* at 1288.

I would expand upon Judge Middlebrooks' arguments by adding the following two pertinent contentions. The first is that the core reasoning of *Marsh*—i.e., that the practice of the first Congress provides strong evidence that the generation that drafted and ratified the Establishment Clause did not believe that the utterance of prayers at legislative sessions violated the Clause<sup>35</sup>—does not apply at the local level because the framers had no reason to consider the applicability of the Clause at the local level.<sup>36</sup> The second—concededly offered without the benefit of empirical research—is that a meeting of a local “legislature” is qualitatively different from a meeting of a state or national legislative body. There may be some citizens “in the gallery” at a state or national legislative session, but ordinary citizens are far more likely to be in attendance—perhaps regularly, perhaps only occasionally—at monthly meetings of city or county commissions, not only because they may have business before the commission, as Judge Middlebrooks noted, but also because it is common for such a local legislative body to provide the opportunity for attending citizens to address the commission.<sup>37</sup> Arguably, these experiential differences—between local legislative entities, on the one hand, and state and national legislatures, on the other—ought to make a difference with respect to the applicability of *Marsh*,<sup>38</sup> an aberrational legal principle based solely on a historical practice should not be lightly extended to apply to situations not wholly analogous to that historical antecedent.<sup>39</sup>

The majority in the Cobb County case, however, was not persuaded that state and local governments should ever be treated differently, for Establishment Clause purposes.<sup>40</sup>

## V. THE LIMITS OF *MARSH*

Assuming, as the court in *Pelphrey v. Cobb County (Pelphrey III)*<sup>41</sup> held, that *Marsh* does control the issue of prayer at local government meetings,<sup>42</sup> what limitations apply, with respect to the content of such prayers?

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35. *Marsh v. Chambers*, 463 U.S. 783, 787–88 (1983).

36. Indeed, it is clear that the first ten amendments to the Constitution initially had no application to state and local governments. Not until 1940 did the Supreme Court declare that the Establishment Clause was “incorporated” into the Due Process Clause of the Fourteenth Amendment, and thereby applicable to state and local governments. *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940).

37. *See Pelphrey III*, 547 F.3d at 1287–88 (Middlebrooks, J., dissenting).

38. *See Marsh*, 463 U.S. at 787–88.

39. *See id.* at 786–89.

40. *Pelphrey III*, 547 F.3d at 1275–76.

41. 547 F.3d 1263 (11th Cir. 2008).

42. *Id.* at 1271.



Again, *Marsh* provides an answer.<sup>43</sup> The majority in *Marsh* was untroubled by the fact that the Nebraska legislature had, for sixteen years, paid a clergyman of one denomination (Presbyterian) to offer prayers which, according to the chaplain, were “nonsectarian” and “Judeo Christian”—whatever that might mean—in nature.<sup>44</sup> The court indicated, as well, that the chaplain “removed all references to Christ after a 1980 complaint from a Jewish legislator.”<sup>45</sup> These facts led Chief Justice Burger to utter the following, fateful sentence: “The content of the prayer is not of concern to judges where, as here, there is no indication that the prayer opportunity has been exploited to proselytize or advance any one, or to disparage any other, faith or belief.”<sup>46</sup> That sentence embodies the key consideration in lower court cases involving prayers at local government meetings.<sup>47</sup> But what does it mean?

It *might* be understood to mean that “nonsectarian” prayers are permissible at such meetings, but that sectarian prayers are not.<sup>48</sup> But Judge Pryor, writing for the majority in the *Pelphrey III* case, rejected that interpretation as “contrary to the command of *Marsh* that courts are not to evaluate the content of the prayers absent evidence of exploitation.”<sup>49</sup> The Supreme Court, he added, “never held that the prayers in *Marsh* were constitutional because they were ‘nonsectarian.’”<sup>50</sup> “The ‘nonsectarian’ nature of the . . . prayers [in *Marsh*, he maintained,] was one factor in [a] fact-intensive analysis.”<sup>51</sup> In rejecting this suggested dividing line, Judge Pryor went so far as to say that “[w]e would not know where to begin to demarcate the boundary between sectarian and nonsectarian expressions,” observing that even plaintiffs’ counsel had difficulty, during oral argument, in deciding whether “king of kings” was a sectarian reference.<sup>52</sup>

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43. *Marsh*, 463 U.S. at 794–95.

44. *Id.* at 793 & n.14.

45. *Id.*

46. *Id.* at 794–95.

47. See *Hinrichs v. Bosma*, 440 F.3d 393, 394–95, 399–400 (7th Cir. 2006) (citations omitted); *Doe v. Tangipahoa Parish Sch. Bd.*, 473 F.3d 188, 191, 202 (5th Cir. 2006); *Wynne v. Town of Great Falls*, 376 F.3d 292, 294, 299–300 (4th Cir. 2004).

48. Indeed, a few federal appellate courts had, prior to the Eleventh Circuit ruling in *Pelphrey III*, interpreted Chief Justice Burger’s language that way. See *Hinrichs*, 440 F.3d at 399–400; *Tangipahoa Parish Sch. Bd.*, 473 F.3d at 202; *Wynne*, 376 F.3d at 299–300; see also *Cnty. of Allegheny v. ACLU, Greater Pittsburgh Chapter*, 492 U.S. 573, 603 (1989) (discussing *Marsh*); *Lund*, *supra* note 22, at 1000.

49. *Pelphrey III*, 547 F.3d 1263, 1271 (11th Cir. 2008).

50. *Id.* (citing *Marsh*, 463 U.S. at 793 n.14).

51. *Id.*

52. *Id.* at 1272.

In the *Joyner* ruling, however, the majority of the three-judge appellate panel appears to have interpreted *Marsh* quite differently.<sup>53</sup> Judge Wilkinson, virtually at the outset of his opinion, stated that “both Supreme Court precedent and our own . . . establish that in order to survive constitutional scrutiny, invocations must consist of the type of nonsectarian prayers that solemnize the legislative task and seek to unite rather than divide.”<sup>54</sup> Later in the opinion, he asserted that “[t]he cases . . . seek to minimize these risks”—the appearance of religious preference and sectarian strife—“by requiring legislative prayers to embrace a nonsectarian ideal.”<sup>55</sup> Still later, he quoted with approval a statement in an amicus brief that “the exception created by *Marsh* is limited to the sort of nonsectarian legislative prayer that solemnizes the proceedings of legislative bodies without advancing or disparaging a particular faith.”<sup>56</sup> Admittedly, Judge Wilkinson distinguished, rather than disapproved of, the Eleventh Circuit’s decision in *Pelphrey III*, pointing to the fact that invocations in Cobb County occasionally featured non-Christian references, whereas no such non-Christian references had found their way into Forsyth County Commission meetings during the time period in question.<sup>57</sup> It must also be acknowledged that Judge Wilkinson’s opinion leaves the reader with some uncertainty as to exactly what is, and is not, forbidden in terms of the content of future Forsyth County prayers.<sup>58</sup> Still, the Fourth Circuit appears to have embraced the “sectarian/nonsectarian” distinction that the Eleventh Circuit unequivocally rejected.<sup>59</sup>

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53. See *Joyner v. Forsyth Cnty.*, 653 F.3d 341, 347–49 (4th Cir. 2011), *cert. denied*, 132 S. Ct. 1097 (2012).

54. *Id.* at 342.

55. *Id.* at 347.

56. *Id.* at 349 (quoting Brief of Amicus Curiae Baptist Joint Committee for Religious Liberty at 13, *Joyner v. Forsyth Cnty.*, 653 F.3d 341 (4th Cir. 2011) (No. 10-1232)).

57. See *id.* at 352–53.

58. The appellate court affirmed the district court’s issuance of “a declaratory judgment that the ‘invocation policy, as implemented, violates the Establishment Clause of the Constitution’ and an injunction against the Board ‘continuing the Policy as it is now implemented.’” *Joyner*, 653 F.3d at 345, 355. Moreover, Judge Wilkinson, immediately after stating that “legislative prayer[s] must strive to be nondenominational so long as that is reasonably possible,” said this: “Infrequent references to specific deities, standing alone, do not suffice to make out a constitutional case. But legislative prayers that go further—prayers in a particular venue that repeatedly suggest the government has put its weight behind a particular faith—transgress the boundaries of the Establishment Clause.” *Id.* at 349. That statement arguably implies that Judge Wilkinson was not in fact insisting upon a strict avoidance of all sectarian prayers. See *id.*

59. *Id.* at 348, 354–55. Judge Wilkinson said nothing regarding the feasibility of such a demarcation, despite the fact that Judge Niemeyer, dissenting, complained that “there is no clear definition of what constitutes a ‘sectarian’ prayer.” *Id.* at 364 (Niemeyer, J., dissenting).

So, is the distinction between “sectarian” and “nonsectarian” prayers in fact an unworkable one, as the Eleventh Circuit panel concluded?<sup>60</sup> “Sectarian” is a word with clear meaning.<sup>61</sup> Would it perhaps be appropriate to treat, as “nonsectarian”—and thus permissible—any word or combination of words like, “king of kings”—which is 1) a common noun—like “lord”—or adjective—like “heavenly,” 2) not generally capitalized, and 3) capable of usage outside of a religious or historical context? The word “god,” even when capitalized, could be viewed as nonsectarian as well.<sup>62</sup> A sectarian reference, in contrast, typically takes the form of a proper noun—or possibly an adjective—that is always capitalized—such as “Jesus,” “Jehovah,” “Allah,” or “Buddha.”<sup>63</sup> On the other hand, a combination of nonsectarian words, like “the father, the son, and the holy ghost,” may have attained sectarian meaning. The matter is thus not entirely subject to bright-line rules, but does that fact render the distinction unworkable?<sup>64</sup>

Furthermore, if the distinction between sectarian and nonsectarian references does not provide the limiting principle in this context, what does? The majority in *Pelphrey III* latched onto the precise language of *Marsh*, which again, indicated that legislative prayers would violate the Establishment Clause only if the offering of such prayers “has been exploited to proselytize or advance” a single religion,<sup>65</sup> and concluded:

The district court did not clearly err when it found that the County did not exploit the prayers to advance one faith by using predominantly Christian speakers. Although the majority of speakers were Christian, the parties agree that prayers were also

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60. A powerful argument that the distinction is “illusory” is found in Robert J. Delahunty, “*Varied Carols*”: *Legislative Prayer in a Pluralist Polity*, 40 CREIGHTON L. REV. 517, 522–26 (2007) (“However inclusionary or ecumenical a prayer is intended to be, it necessarily incorporates a particular theological viewpoint or belief . . .”). But see Lund, *supra* note 22, at 1001 (“It is true that there is no clear boundary between sectarian and nonsectarian prayers. But that does not make the nonsectarian standard incoherent or meaningless.”).

61. It is defined, most pertinently, as “confined to the limits of one religious group, one school, or one party.” WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 2052 (3d ed. 2002).

62. See *id.* at 973, 2052. Note that the word “god” is defined in Webster’s Dictionary—without capitalization—as, *inter alia*, “one who wields great or despotic power.” *Id.* at 973.

63. See Lund, *supra* note 22, at 1005 (quoting *Pelphrey III*, 547 F.3d 1263, 1272 (11th Cir. 2008)).

64. Professor Lund suggests “a possible response to Judge Pryor” as follows: “Religious language objectionable to any of the three major monotheistic religions (Christians, Jews, and Muslims) is overly sectarian and unconstitutional; language acceptable to all three religions is nonsectarian and constitutional.” *Id.* at 1006.

65. *Pelphrey III*, 547 F.3d at 1274 (quoting *Snyder v. Murray City Corp.*, 159 F.3d 1227, 1233–34 (10th Cir. 1998)); *Marsh v. Chambers*, 463 U.S. 783, 794–95 (1983).

offered by members of the Jewish, Unitarian, and Muslim faiths. This diversity of speakers . . . supports the finding that the County did not exploit the prayers to advance any one religion. The speakers . . . represented “a wide cross-section of the County’s religious leaders.”

The finding that the diverse references in the prayers, viewed cumulatively, did not advance a single faith also was not clearly erroneous. The prayers included references from Christianity and other faiths . . . .<sup>66</sup>

More guidance, as to the meaning of this “exploitation” concept, may possibly be derived from the thoughtful opinion of Judge Story, whose ruling in *Pelphrey v. Cobb County (Pelphrey I)*<sup>67</sup> at the district court level was affirmed by the Eleventh Circuit.<sup>68</sup> Judge Story made clear—as Judge Pryor did not—that “exploitation” was all about legislative *motive*:

*Marsh* identifies as the focus of the Establishment Clause analysis the purpose or intent of the legislature, rather than the effects of its practices. . . . In this way, . . . *Marsh* deems the purposeful preference of one religious view to the exclusion of others as the primary evil to be avoided in the arena of legislative prayer.<sup>69</sup>

Judge Story was open, it seemed, to finding such an impermissible purpose on the basis of circumstantial evidence, as he explained, “[w]here the invocation of sectarian concepts or beliefs, viewed from a cumulative perspective, reaches a certain level of ubiquity and exclusivity, the appearance of a legislative preference for one particular faith may well become constitutionally intolerable.”<sup>70</sup> But he was not led to that conclusion in this case, and the Eleventh Circuit panel found no clear error in that regard.<sup>71</sup>

Fairly obviously, that approach raises difficult questions as to how many religions must be represented at such meetings, and how frequently, in order to dispel the suggestion of impermissible preference.<sup>72</sup> Is a municipali-

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66. *Pelphrey III*, 547 F.3d at 1277 (citation omitted).

67. 410 F. Supp. 2d 1324 (N.D. Ga. 2006).

68. *Pelphrey III*, 547 F.3d at 1266–67.

69. *Pelphrey I*, 410 F. Supp. 2d at 1338.

70. *Id.* at 1339.

71. *Pelphrey III*, 547 F.3d at 1277–78 (citing *Pelphrey v. Cobb Cnty.*, (*Pelphrey II*), 448 F. Supp. 2d 1357, 1368–70 (N.D. Ga. 2006)).

72. Professor Lund, critiquing *Pelphrey III*, said this:

It ends up suggesting that the presence of a few non-Christian references or speakers saves a legislative prayer program, regardless of how frequent the Christian references are. . . . If such

ty on safe ground if only Christian and Jewish clergy are invited to deliver prayers, if other religions have a presence in the city? If not, must every such religion be given its opportunity to offer such prayers, or only those with a sufficient number of adherents in the local population—and, if so, what number might *that* be? Moreover, if the city's practice is evaluated on a calendar-year basis, does the selection of a non-Christian prayer leader *once* during that year supply enough diversity to defeat an inference of purposeful preference for Christianity? Would the answer depend on the demographics of the municipality? If not, how many such opportunities would suffice?<sup>73</sup>

The matter of *how* visiting clergy are selected has also arisen, in cases addressing these issues.<sup>74</sup> Indeed, in *Pelphrey v. Cobb County (Pelphrey II)*<sup>75</sup> itself, at the district court level, it was found that the County Planning Commission had, at one point in time, engaged in a constitutionally unacceptable method of selecting clergy, because representatives of “certain faiths were categorically excluded . . . based on the content of their faith.”<sup>76</sup> The Eleventh Circuit upheld that finding, but emphasized that “[t]he ‘impermissible motive’ standard does not require that all faiths be allowed the opportunity to pray. The standard instead prohibits purposeful discrimination.”<sup>77</sup>

In an earlier Fourth Circuit case from Virginia involving this issue, a county resident who identified herself as a “witch” (or wiccan) asked to be added to the list of religious leaders available to deliver invocations at meetings of the county board of supervisors.<sup>78</sup> When her request was denied, she brought suit.<sup>79</sup> The district court held that “the [c]ounty had engaged in [an] impermissible denominational preference,” but the court of appeals reversed.<sup>80</sup> Given the fact that the Nebraska Legislature’s employment of a single Presbyterian minister was deemed constitutional in *Marsh*,<sup>81</sup> along with the fact that Chesterfield County had invited a diverse group of clergy

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token diversity is all that the Establishment Clause requires, state[] and local governments will have no real problem. But little will be left of the requirement of denominational neutrality.

Lund, *supra* note 22, at 1013.

73. Professor Segall has raised similar questions. Segall, *supra* note 22, at 734.

74. See, e.g., *Simpson v. Chesterfield Cnty. Bd. of Supervisors*, 404 F.3d 276, 284, 287 (4th Cir. 2005); *Pelphrey II*, 448 F. Supp. 2d at 1361.

75. 448 F. Supp. 2d 1357 (N.D. Ga. 2006).

76. *Id.* at 1373–74.

77. *Pelphrey III*, 547 F.3d 1263, 1281 (11th Cir. 2008).

78. *Simpson*, 404 F.3d at 279.

79. *Id.* at 280.

80. *Id.* at 280, 288.

81. *Marsh v. Chambers*, 463 U.S. 783, 793–94 (1983).

to its meetings, the court's rejection of a requirement of all-inclusiveness is not surprising.<sup>82</sup>

Indeed, there appears to be no established requirement of all-inclusiveness with regard to represented religions, in this context. In the Eleventh Circuit, under *Pelphrey III*, there is only a ban on *purposeful* exclusivity.<sup>83</sup> But, in determining whether a municipality has crossed the line and entered the realm of impermissible preference, it seems likely that courts will have to address the kinds of "diversity" questions that I have raised herein. Might it not be more challenging for a municipality to try to achieve a satisfactory balance, in terms of religions represented and frequency of inclusion, than it would be to simply insist on the delivery of only nonsectarian prayers—a policy that would reduce the significance of *who* utters the prayer?<sup>84</sup>

## VI. EMPHASIZING THE "ENDORSEMENT" PRINCIPLE

The Supreme Court is quite unlikely to overrule *Marsh*, but even a Supreme Court generally regarded as primarily "conservative"<sup>85</sup> could conceivably revisit its holding in *Marsh* and refine it in light of its later-developed "endorsement" concept; a refinement that would clarify *Marsh* as permitting only nonsectarian prayers at legislative sessions and meetings.<sup>86</sup> This would be consistent with *Marsh*, because the chaplain in *Marsh*, as noted above, described his prayers as "nonsectarian" and had abandoned explicitly Christian references in his prayers.<sup>87</sup>

The endorsement concept is arguably relevant here, even though it is not presently applied—given the court's exclusive reliance on *Marsh*—in the

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82. See *Simpson*, 404 F.3d at 279.

83. *Pelphrey III*, 547 F.3d 1263, 1281 (11th Cir. 2008).

84. Again quoting Professor Lund: "The nonsectarian standard has virtues and vices . . . . Its chief virtue is that it seems the only workable solution to the problem of denominational exclusivity." Lund, *supra* note 22, at 1023. But here, Professor Delahunty is the optimist, contending that a sufficiently pluralistic approach to diversity of religious speakers can ensure that legislative prayer does not result in religious preference. Delahunty, *supra* note 60, at 561–68.

85. As of this writing, four members of the Court have yet to directly address (as Supreme Court Justices) any substantive Establishment Clause issue. Justice Kennedy, moreover, while usually allied with two Justices who have rarely—if ever—found violations of the Establishment Clause, has parted company with them in school prayer cases. See e.g., *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290 (2000). Justice Kennedy has, however, argued against the use of the "endorsement" test. *Cnty. of Allegheny v. ACLU*, Greater Pittsburgh Chapter, 492 U.S. 573, 669 (1989) (Kennedy, J., concurring in part and dissenting in part).

86. See *id.* at 595 (majority opinion).

87. *Marsh v. Chambers*, 463 U.S. 783, 793 n.14 (1983).

legislative-prayer context.<sup>88</sup> Recall Justice O'Connor's explanation that governmental endorsement of religion is constitutionally impermissible because it "sends a message to nonadherents that they are outsiders, not full members of the political community."<sup>89</sup> I think it very likely that a Jewish resident of a city, attending even a single meeting of the city commission—much less repeated instances of the same experience—at which a Christian minister voices his thanks to "Jesus Christ," would feel like an "outsider." I think it quite possible, too, that a Muslim resident of the city, attending a rare city council meeting at which a Jewish rabbi delivered the invocation, would experience a reinforcement of his belief that only Christians and Jews really matter in America. Admittedly, in each of these instances, these feelings of alienation might be alleviated if the Jew or the Muslim knew that his or her religion would be represented at a future meeting of the city council; but it might *not* be represented, or he or she might *not* know that it would, or it might *not* make him or her feel any better about the situation.

In his majority opinion in the *Joyner* case, Judge Wilkinson displayed welcome sensitivity to such concerns, saying this:

Take-all-comers policies that do not discourage sectarian prayer will inevitably favor the majoritarian faith in the community at the expense of religious minorities living therein. This effect creates real burdens on citizens—particularly those who attend meetings only sporadically—for they will have to listen to someone professing religious beliefs that they do not themselves hold as a condition of attendance and participation.<sup>90</sup>

A reinterpretation of *Marsh*, to allow only nonsectarian prayers, would eliminate such unnecessary feelings of alienation.<sup>91</sup> Unless *Marsh* is overturned, of course, there will be no judicial relief forthcoming for sensitive atheists.

## VII. CONCLUSION

For now, however, in the Eleventh Circuit, the looser standard of the *Pelphrey III* decision governs. But, of course, to say that a municipality is

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88. See *Pelphrey III*, 547 F.3d at 1275, 1277.

89. *Lynch v. Donnelly*, 465 U.S. 668, 688 (1984) (O'Connor, J., concurring).

90. *Joyner v. Forsyth Cnty.*, 653 F.3d 341, 354 (4th Cir. 2011), *cert. denied*, 132 S. Ct. 1097 (2012); see also *Lynch*, 465 U.S. at 688; *Galloway v. Town of Greece*, 681 F.3d 20, 28 (2d Cir. 2012); *Mullin v. Sussex County*, No. 11-580-LPS, 2012 WL 1753662, at \*10-11 (D. Del. May 15, 2012).

91. See *Marsh*, 463 U.S. at 793-95.

free, under our Constitution, to engage in a certain practice is not to say that it *must* do so. Every city or county commission in the Eleventh Circuit—which includes Florida—can weigh the perceived benefits of sectarian expression against the costs thereof. It may then choose, on its own and free of judicial compulsion, to decline to allow the utterance of sectarian prayers at its meetings. Or, per *Pelphrey III*, it may choose to allow sectarian prayers, taking care to avoid appearing to prefer one religion over others.<sup>92</sup>

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92. *Pelphrey III*, 547 F.3d at 1271–72; *see generally e.g.*, *Atheists of Fla., Inc. v. City of Lakeland*, No. 8:10-cv-1538-T-17-MAP, 2012 WL 589588, (M.D. Fla. Feb. 22, 2012).